

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 03/16/07;
Decision Issued: 04/23/07; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8529; Outcome: Employee granted Partial Relief. **Administrative Review:**
DHRM Ruling Request received 05/08/07; DHRM Ruling issued 05/25/07;
Outcome: HO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8529

Hearing Date: March 16, 2007
Decision Issued: April 23, 2007

PROCEDURAL HISTORY

On October 4, 2006, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow established written policy. On November 1, 2006, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 8, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 16, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Motor Vehicles employs Grievant as a Special Agent in Charge at one of its Facilities.¹ He has been employed by the Agency for approximately five years. The purpose of his position is:

Provide direction and leadership to LES District Office. Manage daily district operations and supervise the subordinate district Assistant Special Agents in Charge and program support technician. Maintain effective and timely communication with LES Deputy Director of Operations, other LES Executive Staff and DMV administrations. Ensure consistency of operations and policy application statewide. Plan and prioritize operational functions and activities and allocate district resources to meet LES workload and workload and service objectives. Provide program and project management as assigned. Support and assist the Director and the Deputy Directors in their responsibilities. Serve as acting Deputy Director of Operations, when designated to do so.²

¹ Grievant is a sworn law enforcement officer pursuant to *Va. Code § 49-1.1*. See Agency Exhibit 4.

² Agency Exhibit 1.

The Agency may use a “stop” or a “hold” to force a customer to contact an Agency investigator to answer questions. As the Director of Law Enforcement Services testified, use of a stop was appropriate only to (1) stop further transactions on a customer’s account until DMV can determine whether a record is incorrect, (2) force the customer to contact a DMV investigator, or (3) prevent DMV records from being moved until they can be corrected.³

In June 2003, Grievant began investigating a transaction involving a vehicle owned by the Customer.⁴ Grievant wanted to speak with the Customer so he placed a stop on the Customer’s record. On September 7, 2004, the Customer contacted Grievant because of the hold on the Customer’s account. The Customer was unsure why Grievant wished to speak with him. Grievant told the Customer he wanted to speak with the Customer. The Customer told Grievant that he would speak with Grievant but that he wanted to have his Attorney present during the questioning. Later that day, an Attorney for the Customer called Grievant and they discussed the matter. The Attorney told Grievant that the Customer would speak with Grievant but that the Attorney would be present during the conversation. The Attorney asked Grievant to remove the stop. Grievant said he would not deal with the Attorney, and that he would not speak with the Customer with an attorney present, and that the Customer would not receive any renewal of his driver’s license without speaking to the investigator without counsel being present. The Customer did not show up at the scheduled appointment. Grievant did not remove the hold.

On August 3, 2006, the Attorney sent the DMV Commissioner a letter informing the Department of Grievant’s actions and stating, “[t]here is absolutely no legal or constitutional basis for withholding [the Customer’s] driver’s license. I am hoping that these actions of your investigator are merely a renegade officer and not an approved or condoned method of operations of the Department of Motor Vehicles. In any event, it needs to be rectified.” The Attorney added that if the hold was not removed from the Customer’s account, legal proceedings would follow.⁵

Grievant admitted that he made a mistake by refusing to remove the hold he placed on the Customer’s account.⁶

³ The Agency does not have a written policy governing the use of “holds” on a customer’s account.

⁴ The Customer was a victim of a car dealership’s fraud and received a judgment in federal court as result of that fraud.

⁵ Agency Exhibit 5.

⁶ Grievant wrote, “On 8/18/06, after a review of the attorney’s letter I believed that it was a mistake to keep the stop on the record and I deleted the stop on my own and without direction from anyone.” See Agency Exhibit 13.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” DHRM § 1.60(V)(B).⁷ Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DHRM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

The Agency contends Grievant should receive a Group II Written Notice because he failed to comply with the Agency’s written policy. Policy 2-1 of the DMV Law Enforcement Services Policy Manual sets forth constitutional safeguards governing employee behavior. Section X(A)(1) requires:

All officers when conducting criminal investigations shall take all precautions necessary to ensure that all persons involved are afforded their constitutional protections. Officers shall ensure that:

a. All statements or confessions are voluntary and non-coercive.⁸

The Agency argues that by prohibiting the Customer from having his Attorney present during questioning, Grievant violated the Customer’s constitutional right of counsel and, thus, acted contrary to the Agency’s policy. In order to support its position, the Agency must show that the Customer’s right of counsel had attached at the time Grievant prohibited the Customer from having counsel.

The right to counsel, protected by the Sixth Amendment of the U.S. Constitution⁹, does not usually attach in Virginia until formal judicial proceedings have been initiated. In Tipton v. Commonwealth, 18 Va. App. 832, 835 (1994), the Virginia Court of Appeals held:

[The defendant’s] right to counsel under the Sixth Amendment does not attach prior to the initiation of adversarial proceedings **even if he has retained counsel**. (Emphasis added).

The Sixth Amendment right to counsel does not attach until a prosecution is commenced, that is, “at or after the [initiation of adversary] judicial

⁷ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁸ Agency Exhibit 10.

⁹ See also, Virginia Constitution Article 1, Section 8.

[criminal] proceedings [--] whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” (Notations original).

Grievant was in the process of investigating a possible criminal offense, but did not know whether the Customer could be charged with an offense. No adversarial proceedings had been initiated against the Customer at the time the Customer notified Grievant that the Customer had retained counsel and wanted his counsel present during questioning.

Grievant did not violate the Customer’s Constitutional rights. Accordingly, Grievant did not violate the Agency’s policy requiring Grievant to take all precautions necessary to ensure that all persons involved are afforded their constitutional protections. The Agency has not presented sufficient evidence to support the issuance of a Group II Written Notice.

“Inadequate or unsatisfactory work performance” is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Although Grievant did not violate the Customer’s Constitutional right of counsel, Grievant interfered with the Customer’s contractual relationship with his attorney. The Customer and the Attorney entered into an agreement enabling the Attorney to provide legal services to the Customer. The Customer informed Grievant that the Attorney was representing the Customer and the Attorney informed Grievant that the Attorney was representing the Customer. Grievant used the Agency’s “hold” procedure to force the Customer to revoke his contractual agreement with his Attorney. Grievant was not authorized by the Agency to interfere with the Customer’s contractual rights. Interfering with the Customer’s contractual rights was not part of his job duties or expectations. By attempting to deny the Customer’s contractual rights, Grievant exposed the Agency to unnecessary criticism. Accordingly, the Agency has established that Grievant should receive a Group I Written Notice for unsatisfactory job performance.

As part of the Agency’s disciplinary action, the Agency required Grievant to attend a basic constitutional law class in lieu of suspension. DHRM Policy 1.60 defines the appropriate method of disciplining employees. Requiring employees to attend educational classes is not a method of discipline authorized by DHRM Policy 1.60. Accordingly, the portion of the Written Notice requiring Grievant to attend basic constitutional law class is rescinded.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution....”¹⁰ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing

¹⁰ *Va. Code § 2.2-3005.*

officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.¹¹

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice for unsatisfactory job performance.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

¹¹ Grievant alleged during the grievance step process that the Agency retaliated against him. He did not allege this during the hearing and did not present any evidence of Agency retaliation.

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹²

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Motor Vehicles

May 25, 2007

The grievant, through his representative, has requested an administrative review of the hearing officer's decision in Case No. 8529. The grievant is challenging the hearing decision because he feels that it is inconsistent with agency policy. The grievant further feels that the decision is inconsistent with agency policy because his use of the "hold"* mechanism was not subject to any policy and the "hold" action by the grievant cannot be construed as "unsatisfactory work performance" within the meaning of the agency's policy governing Group I discipline. For the reasons stated below, the Department of Human Resource Management will not disturb the hearing decision. The agency head of the Department of Human Resource Management has requested that I respond to this appeal.

FACTS

The grievant is employed by the Department of Motor Vehicles (DMV) as a Special Agent in Charge (SAC) at one of its facilities. In his position he is to "Provide direction and leadership to LES District Office. Manage daily district operations and supervise the subordinate district Assistant Special Agents in Charge and program support technician. Maintain effective and timely communication with LES Deputy Director of Operations, other LES Executive Staff and DMV administrations. Ensure consistency of operations and policy application statewide. Plan and prioritize operational functions and activities and allocate district resources to meet LES workload and workload and service objectives. Provide program and project management as assigned. Support and assist the Director and the Deputy Directors in their responsibilities. Serve as acting Deputy Director of Operations, when designated to do so."

In June 2003, the grievant was investigating a transaction which involved questionable ownership of a vehicle. In order to force the customer to contact him so that they could discuss the issue, the grievant put a "hold" or "stop" on the customer's record. With a "hold" on his record, the customer could not renew his driver's license. More than one year after the grievant placed a "hold on the customer's record, the customer indicated that he would talk to the grievant but he wanted his attorney to be present. The grievant refused to have the attorney present so the meeting did not occur. Approximately one year after that, an attorney representing the customer contacted the DMV Commissioner and threatened legal proceedings in order to have the "hold" removed from the customer's records. The grievant removed the hold from the record some two weeks later, and admitted he had made a mistake to keep it on record.

*"Hold" or "stop" is a mechanism used to force a customer to contact an agency investigator to answer questions.

Based on an internal investigation, on October 3, 2006 the agency issued to the grievant a Group II Written Notice which reads, in part, "SAC S. refused to interview a possible suspect in the presence of his attorney after both the suspect and his attorney asserted right to counsel. This is violation of DMV LES policy 2-1, X. Constitutional Requirements Generally, A. Compliance with constitutional requirements during criminal investigations, 1. All officers when conducting criminal investigations shall take all precautions necessary to ensure that all persons involved are afforded their constitutional protections. ...SAC S. stated in an 8/18/06 email that he did take these wrong actions and did not seek advice until after the suspect and his attorney complained in writing to the Commissioner and the Director had requested his report on the complaint. SAC S. also admitted his mistake in an 8/18/06 meeting with Director Boswell. In lieu of suspension, SAC S. will attend a basic constitutional law class at the Rappahannock Regional Academy the week of 11/27/06." In summary, the DMV concluded that the grievant violated the customer's constitutional rights when he refused to interview a possible suspect in the presence of the customer's attorney.

The grievant appealed the disciplinary action by filing a grievance. When he did not get the relief he sought through the management resolution steps, he requested a hearing before an administrative hearing officer. The hearing officer, in a decision dated April 23, 2007, reduced the disciplinary action to a Group I Written Notice and eliminated the requirement that the grievant attend the Academy for further training.

The relevant policy, the Department of Human Resource Management's Policy #1.60, states that it is the Commonwealth's objective to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. The examples are not all-inclusive. Also, DMV has developed a set of standards, the Virginia Department of Motor Vehicles Law Enforcement Services Policy Manual that defines the behavior of its law enforcement officers.

DISCUSSION

A hearing officer is authorized to make findings of fact as to the material issues in the case and to determine the grievance based on that evidence. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. Any challenge to the hearing decision must refer to a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy or provision.

In his decision, the hearing officer wrote, in part,

Grievant did not violate the Customer's Constitutional rights. Accordingly, Grievant did not violate the Agency's policy requiring Grievant to take all precautions necessary to ensure that all persons involved are afforded their constitutional protections. The Agency has not presented sufficient evidence to support the issuance of a Group II Written Notice.... Although Grievant did not violate the Customer's Constitutional right of counsel, Grievant interfered with the Customer's contractual relationship with his attorney. The Customer and the Attorney entered into an agreement enabling the Attorney to provide legal services to the Customer. The Customer informed Grievant that the Attorney was representing the Customer and the Attorney informed the Grievant that the Attorney was representing the Customer. Grievant used the "hold" procedure to force the Customer to revoke his contractual agreement with his Attorney. Grievant was not authorized by the Agency to interfere with the Customer's contractual rights, Interfering with the Customer's contractual rights was not part of his job duties or expectations. By attempting to deny the Customer's contractual rights, Grievant exposed the Agency to unnecessary criticism. Accordingly, the Agency has established that Grievant should receive a Group I Written Notice for unsatisfactory job performance.

The Department of Human Resource Management does not have the authority to determine whether the grievant violated the customer's constitutional rights. However, the evidence supports that the action the grievant took was not within the authority granted to him by either agency policy or defined in his Employment Work Profile. It is expected and permitted by DHRM Policy 1.60 for an agency head to take disciplinary action if, in his judgment, an offense undermines the effectiveness of an agency's activities.

Our review of the hearing decision revealed that the hearing officer did not violate any Department of Human Resource or Department of Motor Vehicles policy when he made his determination in this case. In summary, this Agency has determined that the hearing decision is consistent with state and agency policy. Therefore, we have no basis to interfere with the application of this decision.

Ernest G. Spratley